Tentative Rulings for April 11, 2012
Departments 402, 403, 501, 502, 503

There are no tentative rulings for the following cases. The hearing will go forward on these matters. If a person is under a court order to appear, he/she must do so. Otherwise, parties should appear unless they have notified the court that they will submit the matter without an appearance. (See California Rules of Court, rule 3.1304(c).)

11CECG03580 ***Pearson v. Cervantez*** **(Dept. 501)**

The court has continued the following cases. The deadlines for opposition and reply papers will remain the same as for the original hearing date.

10CECG04337 ***Vello v. City of Selma*** **(Dept. 502) [Hearing on motions to compel has been continued to Wednesday, April 25, 2012, at 3:30 p.m. in Dept. 502]**

11CECG03654 ***Santos v. CWALT, Inc., et al.*** **[Hearing on demurrer has been continued to April 26, 2012, at 3:30 p.m. in Dept. 403]**

10CECG04464 ***Smith v. Bank of America, N.A., et al*****. is continued to Thursday, April 12, 2012, at 3:30 p.m. in Dept. 402.**

11CECG01451 ***Cital v. The McCaffrey Group et al*****. is continued to Thursday April 24, 2012, at 3:30 p.m. in Dept. 503.**

(Tentative Rulings begin at the next page)

[10]

Tentative Ruling

Re: ***Steven Clark v. Christopher Cooper, et al.***
Superior Court Case No. 10 CECG 03376

Hearing Date: **Wed., April 11, 2012 (Dept. 501)**

Motion: Defendants'
(1) UNOPPOSED Motion to Trifurcate or Bifurcate
(2) Motion for Summary Judgment/Adjudication

Plaintiff's Ex Parte Application for Leave to File Supplemental Opposition to SJ Motion and to Hold In Camera SJ Hearing on 4/11/12

Tentative Ruling:

To GRANT the motion to trifurcate for the reasons set forth in Defendant's moving papers. (**CCP 598; 1048 (b)**.)

To DENY the motion for summary judgment and summary adjudication. (**CCP 437c**.)

Plaintiff's Ex Parte Application is rendered moot by the court's denial of the Defendants' motions for summary judgment/adjudication. If Plaintiff wishes to admit at trial the officers' impeachment testimony from the Internal Affairs Investigation, Plaintiff must bring a motion in limine, before the judge assigned for trial, no less than 14 calendar days before trial.

Explanation:

Motion for Summary Judgment/Adjudication

The First Amended Complaint filed on 1/24/11 alleges 4 remaining causes of action. The fifth cause of action for IIED was dismissed with prejudice after the court sustained Defendants' demurrer.

1. **Battery** against officer Cooper

2. **Negligence** against officer Cooper and the City of Fresno Superior Court

3. Violation of Civil Code 52.1

4. False Imprisonment

Defendants move for summary judgment. Defendants also move for summary adjudication as to all four causes of action and as to the request for punitive damages.

General Law

Defendants bring this motion for summary judgment. To prevail, defendants have the burden of proving that there is a complete defense or that plaintiff cannot establish one or more elements of each of her causes of action. (**Barber v. Marina Sailing, Inc.** (1995) 36 Cal.App.4th 558, 562, 42 Cal.Rptr.2d 697.) To show that plaintiff cannot establish her claims, defendants may either (1) affirmatively negate one or more elements of each claim, or (2) by relying on plaintiff's inadequate discovery responses, show that plaintiff does not possess and cannot reasonably obtain needed evidence. (**Aguilar v. Atlantic Richfield** (2001) 25 Cal.4th 826, 855.)

The ultimate burden of persuasion rests on defendants, as the moving party. The initial burden of production is on defendants to show by a preponderance of the evidence, that it is more likely than not that a given element cannot be established or that a given defense can be established. (**Aguilar v. Atlantic Richfield** (2001) 25 Cal.4th 826, 850.)

If defendants carry this initial burden of production, the burden of production shifts to plaintiff to show that a triable issue of material fact exists. Plaintiff does this if she can show, by a preponderance of the evidence, that it is more likely than not that a given element can be established or that a given defense cannot be established. (**Aguilar v. Atlantic Richfield** (2001) 25 Cal.4th 826, 850, 852.)

In determining whether plaintiff has met her burden of production, the court must evaluate the plaintiff's evidence independently. That is, the court may not weigh the plaintiff's evidence or inferences against the defendants', as if the court were sitting as a trier of fact. If the plaintiff meets her burden, then the court must deny summary judgment, even if defendants have presented conflicting evidence. If the plaintiff meets her burden, a reasonable trier of fact could find for plaintiff and a triable issue of fact does exist for the jury to consider. (**Aguilar v. Atlantic Richfield** (2001) 25 Cal.4th 826, 856-857.)

However, the court is entitled to consider all of the evidence presented by both parties, so that documents and evidence presented by plaintiffs in opposition to the motion may cure evidentiary gaps in the moving papers. (Weil &

Brown, Civil Procedure Before Trial (The Rutter Group 1997 ed. & 2002 Supp.) Summary Judgment, ¶ 10:251, p. , citing **Villa v. McFerren** (1995) 35 Cal.App.4th 733, 749, 41 Cal.Rptr.2d 719, 730; Code Civ. Proc., § 437c (c) [The court shall consider all the papers submitted, all admissible evidence therein, and all inferences reasonably deducible therefrom.)

In determining whether any triable issues of material fact exist, the court must strictly construe the moving papers and liberally construe the declarations of the party opposing summary judgment. Any doubts as to whether a triable issue of material fact exist are to be resolved in favor of the party opposing summary judgment. (**Barber v. Marina Sailing, Inc.** (1995) 36 Cal.App.4th 558, 562, 42 Cal.Rptr.2d 697.)

The issues are framed by the pleadings. The pleadings determine which issues are material in a summary judgment motion. The moving party's evidence must be directed to the claims and defenses raised by the pleadings. (Weil & Brown, Civil Procedure Before Trial (The Rutter Group 1997 ed. & 2002 Supp.) Summary Judgment, ¶ 10:230, p. 10-75.)

1. The first cause of action for battery fails because Officer Cooper used reasonable force under the totality of the circumstances.

Defendants argue that to prevail on a claim of battery against a peace officer, Plaintiff must prove that the officer used unreasonable force.

Defendants fail to make a prima facie showing that Officer Cooper's conduct was reasonable as a matter of law. Defendants' Separate Statement lays out the facts of what happened. But Defendant's memorandum in support adds editorial information that simply isn't present in the basic facts set forth in the Separate Statement.

For example, counsel states that "Officer Cooper had just a split-second upon arriving and seeing Officer Leyva face down with Plaintiff's arms around her, to make a decision of what action to take to ensure the safety of Officer Leyva, Officer Escareno, and himself." (Defendants' Memo in Support at p. 7.) Yet the Facts cited, 13, 14, 17-20, 22, and 24, make no mention of any testimony by the officers as to how much time Officer Cooper had to make his decisions.

Counsel also states that "Officer Cooper was confronted with a tense situation of responding to a radio call from a fellow Fresno police officer, Officer Leyva, for assistance with a combative subject." (Defendants' Memo in Support at p. 7, citing Fact 6.) But Fact 6 does establish that the situation was tense. It does not present any evidence to show how urgent or dangerous the situation was from the prespective of the officers involved.

In addition, Defendants' Separate Statement fails to present sufficient testimony by Officer Cooper to establish what he saw, thought, or heard and to establish why he used the amount of force he did and why he deemed it appropriate to use that level of force.

So the burden does not shift to Plaintiff to show that triable issues of material fact exist.

Even assuming, for the sake of argument, that the burden did shift to Plaintiff, Plaintiff's Responsive Separate Statement establishes that there are triable issues of material fact as to how well the area was lit, what the officers saw when they arrived, what a reasonable officer would have observed, whether Officer Leyva did or did not need assistance, and whether the amount of force that Officer Cooper used was reasonable or unreasonable under the totality of the circumstances.

In Opposition, Plaintiff argues correctly that Defendants fail to provide any evidence about the degree of force that Cooper used. Plaintiff argues correctly that Defendants fail to present evidence to show that Cooper's use of force was "relatively minimal" and fail to show that it was a reasonable amount of force.

The motion for summary adjudication is DENIED as to the first cause of action.

2. The second cause of action for negligence fails because Officer Cooper used reasonable force under the totality of the circumstances.

Defendants argue correctly that the City of Fresno cannot be held directly liable for negligence, but may only be held vicariously liable for the negligence of Officer Cooper.

As explained above in the analysis of issue 1, Defendants fail to make a prima facie showing that Officer Cooper used reasonable force on Clark as matter of law. So the burden does not shift to Plaintiff.

The motion for summary adjudication is DENIED as to the second cause of action.

3. The third cause of action for violation of Civil Code 52.1 fails because there is no evidence that Officer Cooper used threats, intimidation, or coercion to interfere or attempt to interfere with Plaintiff's Constitutional rights.

A. Right to Make Citizen's Arrest.

According to Defendants, Plaintiff maintains that Officer Cooper interfered with his right to make a citizen's arrest of the suspect Packard. Defendants present evidence that Plaintiff was not trying to arrest Packard and never intended to conduct or complete a citizen's arrest. (Fact 29; Gustafson Decl. at Ex. A, Clark Depo at 75-76, 78.)

Defendants make a prima facie showing that Officer Cooper did not violate Civil Code 52.1 because he could not have interfered with a right that Plaintiff had no intention of exercising.

Defendants also argue that no interference occurred because the citizen's arrest was completed when Officers Cooper and Escareno arrived and took custody of Packard.

The burden shifts to Plaintiff to show that triable issues of material fact exist. In Opposition, Plaintiff argues that Defendant's own facts 9, 11, 13, and 14 show that Plaintiff did arrest Packard. It is undisputed that Plaintiff put his arms around Packard's chest and tossed him to the ground, that Packard got up so Plaintiff used another hip toss to take Packard to the ground again.

Plaintiff argues that it is disputed precisely how the parties were positioned. Defendants argue that Plaintiff was lying on Officer Leyva who was in turn lying on Packard. Plaintiff argues that Leyva was on the ground next to Packard, lying on Packard's arm. And that Plaintiff was on the ground to the other side of Packard. (Response to Fact 14.)

Plaintiff argues correctly that there is a triable issue of fact as to whether Officer Cooper interfered with Clark's exercise of his right, even though Clark didn't necessarily understand the legal ramifications of his conduct. Clark's conduct may have constituted an attempt to arrest Packard, even though Clark didn't necessarily realize that his conduct amounted to an attempted arrest.

Therefore, Plaintiff carries his burden of showing that triable issues of a material fact exist as to whether or not Officer Cooper interfered with Defendants' efforts to make a citizens' arrest, or whether the arrest was completed without any interference.

The motion for summary adjudication is DENIED as to the third cause of action on this ground.

B. Right to be Free from Unreasonable Search and Seizure

Plaintiff also argues that the facts alleged in the third cause of action establish a violation of his right to be free from unreasonable searches or seizures. (**Burns v. City of Redwood City** (N.D. Cal. 2010) 737 F. Supp. 2d 1047, 1065 [a claim that a police officer employed excessive force implicates the Fourth Amendment's prohibition on unreasonable seizures].) This argument appears to be correct.

The balancing test for excessive force claims requires careful attention to the facts and circumstances of each particular case. Because an excessive force claim nearly always requires a jury to sift through disputed factual contentions, and to draw inferences therefrom, summary judgment in excessive force cases should be granted sparingly. This is because police misconduct cases almost always turn on a jury's credibility determinations. (**Burns**, 737 F. Supp. 2d at 1058-1059, citing (**Santos v. Gates** (9th Cir. 2020) 287 F.3d 846, 853.)

But as a procedural matter, Plaintiff failed to plead in his First Amended Complaint which specific right the Defendants allegedly violated. (See CACI 3025, Judicial Council of California Civil Jury Instructions at pp. 259.) So Plaintiff failed to put Defendants on formal notice that this was a legal basis for his claim. And lacking proper notice, Defendants may have been prejudiced. Defendants may not have conducted appropriate discovery or scheduled relevant witnesses to address this claim.

So it would be unfair to permit Plaintiff, on the eve of a summary judgment motion that has already been fully briefed, to amend his pleading at the last minute, solely to defeat the motion. If the court were to permit this, then plaintiffs could routinely defeat summary judgment motions merely by "sandbagging" and introducing new claims or allegations at the last minute.

Accordingly, the court will not consider Plaintiff's argument as a ground for defeating Defendants' summary judgment motion.

If Plaintiff wishes to raise this legal theory at trial, then Plaintiff must seek leave to amend his pleading.

4. The fourth cause of action for false imprisonment fails because Officer Cooper had reasonable suspicion to detain or probable cause to arrest Plaintiff

Defendants argue that Officer Cooper made an honest mistake that Clark was the suspect whom Officer Leyva was trying to subdue. Defendants argue

that Officer Cooper reasonably believed that Clark was assaulting or battering Officer Leyva.

But Defendants fail to make a prima facie showing Officer Cooper had reasonable suspicion or probable cause as a matter of law. Defendants fail to show that no reasonable jury could reach a different conclusion, as a matter of law.

So the burden does not shift to Plaintiff.

The motion for summary adjudication is DENIED as to the fourth cause of action.

5. Request for Punitive Damages

Defendants argue that Plaintiff may not recover punitive damages because Officer Cooper's conduct did not involve malice, oppression, or fraud. Defendants argue that Officer Cooper's conduct was objectively reasonable under the totality of the circumstances.

But Defendants fail to carry their initial burden to make a prima facie showing that Cooper's conduct did not involve malice or oppression. That conduct clearly did not involve fraud. But triable issues of material fact remain as to whether Cooper's conduct constituted malice or oppression.

The motion for summary adjudication is DENIED as to this issue.

Pursuant to CRC Rule 3.1312(a) and CCP § 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: M.B. Smith on 4/10/12 .
(Judge's initials) (Date)

[10]

Tentative Ruling

Re: ***Lauderdale v. Garcia***
Superior Court Case No. 11 CECG 02841

Hearing Date: **Wed., April 11, 2012 (Dept. 503)**

Motion: **Defendant's Demurrer and Motion to Strike the Second Amended Complaint**

Tentative Ruling:

To OVERRULE the Demurrer to the 1st, 3rd, and 4th causes of action.

To GRANT the motion to strike the 9th cause of action. To strike the 8th cause of action sua sponte. The court sua sponte strikes both the 8th and 9th causes of action because they were filed without leave of court, and also for the additional reasons specified below.

Explanation:

Demurrer to 1st, 3rd, and 4th causes of action for Fraud, Elder Financial Abuse, and Conversion

On 12/8/11, Defendant demurred to the 1st, 3rd, and 4th causes of action of the First Amended Complaint. Defendant argued correctly that Plaintiff had failed to file the declaration required by CCP 377.32 and therefore should not be allowed to commence or maintain the lawsuit. (**CCP 377.32**.)

The court provided no analysis of the issue, but ordered Plaintiff to file the declaration. Despite the court's order, Plaintiff still failed to file the CCP 377.32 declaration. So Defendant was forced to bring this demurrer again.

In Opposition, Plaintiff finally filed the required declaration on 3/28/12. So the demurrer is technically moot.

In Reply, Defendant argues that the declaration is deficient. The declaration merely asserts that Evelyn Lauderdale is decedent's trustee and successor-in-interest, but the declaration fails to state facts in support of this assertion. (**CCP 377.32 (a)(5)(A)**.) Defendant argues that a trustee cannot be a successor-in-interest of decedent's estate.

Analysis: Successor-in-Interest

The question before the court is whether Plaintiff has alleged facts sufficient to support her allegation that she has standing to bring suit as decedent's successor-in-interest. (**CCP 377.11, 377.10, 377.32 (a)(5)(A)**.)

When a person dies, any claims that survive her pass to her successor-in-interest. Only a personal representative or a successor-in-interest may bring a lawsuit based on the decedent's claims. (**CCP 377.20**.) Here, Plaintiff does not allege that she is the decedent's personal representative. And there is no evidence of any probate proceeding wherein the court appointed Plaintiff as a personal representative. So if Plaintiff has standing to bring this suit, it must be as the successor-in-interest of the decedent.

The Code of Civil Procedure defines a successor-in-interest as (1) "the beneficiary of decedent's estate" or (2) "other successor in interest who succeeds to a cause of action or to a particular item of the property that is the subject of a cause of action." (**CCP 377.11**.)

CCP 377.10 defines the "beneficiary of the decedent's estate" as:

(a) a beneficiary who succeeds to a cause of action or an item of property under the will; or

(b) if there is no will, then a person who succeed to claims or property under Probate Code sections 6401 and 6402, governing intestate succession for surviving spouses and other kin.

Because Plaintiff alleges in the Second Amended Complaint that the decedent left a valid will, section **377.10 (a)** controls and section 377.10 (b) does not apply.

Plaintiff alleges that she is the trustee of the living trust established by decedent in 2007. (SAC at Ex. A.) And she was co-executor of decedent's 8/23/07 will, deposited with the court on 10/17/11 in case number 11 CEPR 00900. The will provided that her entire estate would be given as a gift to the trustee of her 2007 trust, as "pour-over beneficiary."

Accordingly, if a trustee of a living trust is named as a beneficiary, who succeeds to a cause of action or item of property under a valid will, then the trustee would appear to qualify as a beneficiary of decedent's estate and as a successor-in-interest of decedent.

The language of **CCP 377.10** is somewhat ambiguous, because it neither expressly includes nor expressly excludes trustees of living trusts as

beneficiaries. The Law Revision Committee Comments state that **CCP 377.10** was "a new provision drawn from **Probate Code 13006**. And **section 13006** expressly provides that trustees of certain living trusts do qualify as beneficiaries of the estate and as successors-in-interest. ""For purposes of this part, a trust is a beneficiary under the decedent's will if the trust succeeds to the particular item of property under the decedent's will."

The Law Revision Commission Comments to **section 13006** state that "A trustee of a trust created by the will of the decedent is not a beneficiary under the decedent's will for purposes of this part. Only the trustee of a trust created during the decedent's lifetime that is entitled to all or a portion of the decedent's property may act as a successor of the decedent under this part."

So it remains unclear why, in drafting **CCP 377.10**, the California Legislature did not include specific language from **section 13006** regarding trustees of living trusts. Did the Legislature intend to exclude such trustees as persons who could maintain a lawsuit, or did the Legislature believe that it was so obvious that trustees qualified as beneficiaries that it was unnecessary to include specific language including trustees as beneficiaries?

Defendant argues that, at the time the will was signed, decedent was still the trustee of her own trust, so that Plaintiff does not qualify as the trustee under the will. But this argument fails because CCP 377.10 refers to beneficiaries of decedent's estate under the will. So the plain meaning of CCP 377.10 is that the beneficiary is to be determined after the decedent's death.

The Law Revision Commission Comments to **CCP 377.30** appears to expressly provide that a trustee may qualify as a successor-in-interest. "The distributee of the cause of action in probate is the successor in interest or, if there is no distribution, the heir, devisee, trustee, or other successor has the right to proceed under this article.

And **CCP 369** provides that either the personal representative or the trustee of an express trust may sue without joining as parties the persons for whose benefit the action is prosecuted.

Accordingly, the court concludes that Plaintiff, at the pleading stage, has set forth facts in her declaration sufficient to allege her standing to maintain this action.

This does not constitute a final adjudication of the matter. The court makes no factual findings as to whether Plaintiff is a genuine trustee, beneficiary, or successor-in-interest under the law. The court merely concludes that Plaintiff have pled facts that, if proven true at trial, would establish that Plaintiff has standing to sue as successor in interest. Defendant is still free to challenge Plaintiff's standing to maintain this suit on a motion for summary judgment or at

trial. And if the matter is raised again, the parties are free to file additional briefs addressing this mixed question of law and fact.

Defendant has filed a petition in probate seeking to remove Plaintiff as the trustee. (11 CEPR 01018.) Defendant argues that in that case Plaintiff has attacked the validity of certain testamentary documents, namely the first and third amendments to the trust. But Plaintiff's arguments in the Petition do not appear to be inconsistent with the standing argument raised in her Opposition.

Motion to Strike
8th Cause of Action for Recovery of Funds
(Probate Code 859)

The court sua sponte strikes this cause of action without leave to amend for three reasons. First, it was filed without leave of court. Plaintiff must bring a noticed motion seeking leave to amend before she adds new causes of action or new prayers for relief. Second, the cause of action is confusing because it also cites Probate Code 850, which does not appear to be relevant.

And third, **Probate Code 859** appears to be solely a remedy provision. It doesn't appear to create an independent cause of action. Section 859 permits Plaintiff to recover double damages if the Defendant "has in bad faith wrongfully taken, concealed, or disposed of property belonging to the estate of a decedent." So if Plaintiff is seeking to assert this remedy, Plaintiff needs to seek leave to amend its prayer for damages.

Motion to Strike
9th Cause of Action for Undue Influence

A. Failure to Seek Leave of Court

The court sua sponte strikes this cause of action without leave to amend because it was filed without leave of court. Plaintiff must bring a noticed motion seeking leave to amend before she adds new causes of action or new prayers for relief.

B. No Cause of Action for Undue Influence

Second, the court also strikes this cause of action without leave to amend because there is no such thing as a cause of action for undue influence. Typically, a defendant will raise undue influence as an affirmative defense to defeat a plaintiff action to enforce a contract.

At one time, a party alleging undue influence could bring a cause of action for rescission of contract due to undue influence. (**Bozarth v. Birch**

(1921) 52 Cal.App. 55, 59-60 [where plaintiff alleges undue influence proper cause of action was for rescission].)

But now the cause of action for rescission has been abolished. So it appears that rescission is a remedy or form of relief, and not a formal cause of action. "Pursuant to a recommendation of the Law Revision Commission, the equitable action to have a rescission adjudged was abolished in 1961, and the statutes now deal solely with unilateral rescission by notice and offer to restore the consideration." (1 Witkin, Summary of California Law (10th ed. 2005) Contracts, § 930, pp. 1026-1027.)

"The Civil Code originally provided for rescission by a party (C.C. 1689) and also for an action to have a rescission adjudged (former C.C. 3406.) [citations omitted]. Later cases made it clear that a party having the right to rescind could accomplish a completed rescission by taking the steps specified in C.C. 1691." (Idem.)

In other words, if a plaintiff wants to rescind a contract, she would normally comply with the requirements of Civil Code 1691. She would normally not need to bring an equitable cause of action for rescission.

C. Restitution

It appears that Plaintiff may have intended to bring a cause of action for "RESTITUTION after completed unilateral rescission." (4 Witkin, California Procedure (5th ed. 2008) Pleading, § 541, pp. 668-669.)

"The traditional equitable action to have the rescission of a contract adjudged was recognized in former C.C. 3406. Its purpose was not only to terminate future obligations under the contract but to restore the parties to their former position by requiring, whenever possible, the restoration of consideration received or its value." (Id.)

"The equitable action was abolished in 1961, and the remedy is now a legal action for restitution based on a completed unilateral rescission. The plaintiff after unilateral rescission may plead a cause of action for restitution in the form of a common count." (Id.)

"Although notice and offer to restore are still required, they need not occur before the action, and therefore need not be alleged in the complaint. If the notice or offer has not been otherwise given, the service of a pleading in an action or a proceeding that seeks relief based on rescission shall be deemed to be such notice or offer or both." (Id.)

D. No Contract Alleged

Defendant argues correctly that if Plaintiff is seeking to rescind a contract, then Plaintiff must identify that contract. But Plaintiff has failed to identify any such contract.

E. Probate Action to Invalidate Will or Testamentary Document

If Plaintiff is seeking to invalidate a will or testamentary document, then she must bring a petition in the probate division of this court. She already appears to have done this in 11 CEPR 01018. If she is already petitioning to invalidate the first and third amendments to the trust in the probate division, it is not necessary for her to simultaneously assert the same claim in the unlimited civil division.

On the contrary, to simultaneously bring two identical claims in the probate and unlimited civil divisions would create a risk of conflicting rulings and would also waste judicial resources.

A probate contest requires a specialized legal inquiry. Defendant argues correctly that the "undue influence" analysis in a probate case is different from the "undue influence" analysis in a typical breach of contract case. (Cf. **O'Neil v. Spillane** (1975) 45 Cal.App.3d 147, 155.)

"The rule proposed by appellants has applicability only to will contest cases where the testamentary capacity and the freedom of will of a testator are questioned. In such cases the test of proving undue influence is indeed whether the legatee exercised 'a pressure which overpowered the mind and bore down the volition of the *testator* at the very time the will was made,' and that 'the influence was such as, in effect, to destroy the *testator's* free agency and substitute for his own another person's will.'" (Id.)

"However, the cases make it evident that in order to prove that one is in a mentally weakened condition within the meaning of section 1575 it is not necessary to show total incapacity to contract, but only that the grantor is lacking in such mental vigor as to enable him to protect himself against an imposition." (Id.)

Accordingly, the court strikes the 9th cause of action without leave to amend.

Pursuant to CRC Rule 3.1312(a) and CCP § 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling Issued By: **A.M. Simpson** (Judge's initials) **on** **4-10-12** (Date).

03

Tentative Ruling

Re: ***Kuofos v. Pleasant Valley State Prison***
Case No. 11 CE CG 04201

Hearing Date: April 11th, 2012 (Dept. 503)

Motion: Petition for Relief from Claim Filing Requirement

Tentative Ruling:

To continue the hearing on the petition to April 25th, 2012 at 3:30 p.m. in Department 503 to give petitioner an opportunity to review the court's tentative ruling and appear for oral argument.

To deny the petition for relief from the claims filing requirement for lack of service on respondent California Department of Corrections via the Attorney General's office. (Govt. Code § 945.6(d).)

Explanation:

Under § 945.6(d), "A copy of the petition and a written notice of the time and place of hearing shall be served before the hearing as prescribed by subdivision (b) of Section 1005 of the Code of Civil Procedure on… the Attorney General, if the respondent is the state."

Here, the respondent would be the State of California, although petitioner has named Pleasant Valley State Prison as the respondent. The CDCR would be the proper defendant in the action, which is a division of the State of California. Therefore, the petitioner must serve the Attorney General's office with notice of the petition before the petition may be heard. However, there is no evidence that petitioner has served the Attorney General or anyone else with notice of the petition.

The court has already continued this matter for 60 days to allow petitioner a chance to serve the CDCR through the Attorney General's office, and petitioner has not provided a proof of service to the court showing that he served the petition on respondent. Therefore, the court cannot hear the merits of the petition, and instead it intends to deny the petition for lack of service.

Pursuant to CRC 3.1312 and CCP §1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling **A.M. Simpson** **4-9-12**
Issued By: _____ on _____.
(Judge's Initials) (Date)

(18)

Tentative Ruling

Re: ***Sylvia Susana Mendoza, et al. v. MJ Construction, et al.***
Case no. 11CECG00974
Patricia Avilez, et al. v. MJ Construction, et al.
Case no. 11CECG04288

Hearing Date: **April 11, 2012 (Dept. 403)**

Motion: To consolidate cases

Tentative Ruling:

To deny without prejudice pursuant to California Code of Civil Procedure (CCP) section 1048(a) and California Rules of Court (CRC) rule 3.350, subdivisions (a) and (b).

Explanation:

It appears that plaintiffs seek complete consolidation. Complete consolidation may be ordered where the parties are identical and the causes of action could have been joined. (*Hamilton v. Asbestos Corp., Ltd*. (2000) 22 Cal.4th 1127, 1147-1148.) Most importantly, it appears that there is no proof of service of the motion filed separately or even attached to the moving papers. As such the motion does not comply with CRC rule 3.350(a)(2)(C). This defect is not cured by the notice of related case filed on February 7, 2012. Thus, it is not possible to determine whether the motion was served on all attorneys of record and all nonrepresented parties in all of the cases sought to be consolidated so the motion does not comply with CRC rule 3.350(a)(2)(B). Further, CRC rule 3.350(a)(1)(C) requires that the notice of motion be filed in each case sought to be consolidated, and it appears that only one set of original moving papers was filed for case no. 11-00974, and that the notice was not filed in case no. 11-04288. Accordingly, the motion is denied without prejudice.

Pursuant to CRC rule 3.1312, and CCP section 1019.5, subdivision (a) no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling **MWS** **4/10/12**

Issued By: _____ **on** _____.
(Judge's initials) (Date)

03

Tentative Ruling

Re: ***Coplin v. Dennis' Auto Repair***
Case No. 10 CE CG 02885

Hearing Date: April 11th, 2012 (Dept. 402)

Motion: Defendant E-Z Haul Ready Mix's Motion for Summary Judgment, or in the Alternative Summary Adjudication

Defendant Dennis' Auto Repair's, Dennis Schlundt, and Linda Schlundt's Motion for Summary Judgment

Tentative Ruling:

To deny the motion for summary judgment of the entire complaint as to defendant E-Z Haul. To grant summary adjudication as to the first cause of action for premises liability, but to deny summary adjudication of the second cause of action for general negligence. (CCP § 437c.)

To deny the motion for summary judgment as to defendants Dennis' Auto Repair, Dennis Schlundt, and Linda Schlundt. (*Ibid*.)

Explanation:

E-Z Haul's Motion: With regard to the premises liability cause of action, E-Z Haul argues that it cannot be held liable for premises liability because it did not own, control, or possess the property on which the accident occurred.

"In premises liability cases, summary judgment may properly be granted where a defendant unequivocally establishes its lack of ownership, possession, or control of the property alleged to be in a dangerous or defective condition. [Citation.] This follows from the rule that the duty to take affirmative action for the protection of individuals coming onto one's property 'is grounded in the possession of the premises and the attendant right to control and manage the premises.' [Citations.] Without the 'crucial element' of control over the subject premises [citation], no duty to exercise reasonable care to prevent injury on such property can be found. [Citation.]" (*Gray v. America West Airlines* (1989) 209 Cal.App.3d 76, 81.)

Here, defendant has not presented any declarations, deposition testimony, discovery responses, or documents showing that plaintiff cannot prove that defendant did not own, control or possess the property where the accident occurred. The only facts presented by defendant in its separate statement that

address the issue of ownership, possession or control over the property are undisputed facts 6, 7, and 8. However, these facts only recite the allegations of the complaint, which simply states that defendants Dennis' Auto Repair, Dennis Schlundt, Inc., Dennis and Linda Schlundt, ***and Does 1 through 25*** were the owners, possessors and landlords of the subject property where the accident occurred. (Complaint, ¶¶ 7-9.) Since E-Z Haul was added to the case in place of one of the Doe defendants, the complaint effectively alleges that E-Z Haul was also an owner, possessor, or landlord of the property as well. (See Exhibit C to defendant's evidence, Second Amendment to Complaint dated December 2nd, 2010.) Defendant has not offered any evidence that would tend to show that this allegation is not true, or that would demonstrate that plaintiff cannot prove E-Z Haul was an owner, possessor, or controller of the property.

However, E-Z Haul has submitted a stipulation, in which plaintiff and E-Z Haul have agreed that E-Z Haul did not have any ownership, possession, or control over the premises where the accident occurred. (See Stipulation filed April 4th, 2012.) This stipulation effectively meets defendant's burden of presenting evidence showing that E-Z Haul did not have ownership, possession or control over the premises, and thus it cannot be held liable for failing to repair or warn of a dangerous condition on the premises. *Gray v. America West Airlines, supra*, 209 Cal.App.3d at 81.) As a result, the court intends to grant summary adjudication in favor of E-Z Haul on the first cause of action for premises liability.

Next, with regard to the second cause of action for general negligence, E-Z Haul argues that it cannot be held liable under a negligence theory because it did not owe any duty to plaintiff under the circumstances, since it was not foreseeable that plaintiff would be injured as a result of E-Z Haul's negligence. Like Apple Valley, E-Z Haul relies on *Romito v. Red Plastic Co*. (1995) 38 Cal.App.4th 59, in which the Court of Appeal found that a manufacturer of a plastic skylight through which plaintiff's decedent fell to his death had no duty, as a matter of law, to manufacture skylights strong enough to hold the weight of the decedent. (*Id*. at 66-69.)

"Dur-Red's ability to prevent future harm is limited by its total lack of control over various external factors affecting the risk of harm. Those factors include, for example, the roof's design, the layout and installation of the skylights, the roof's accessibility to the public, the presence of screens or rails around the skylight, the training, skill, and safety equipment used by workers coming near the skylight, and the maintenance of the skylight and surrounding area. In this case, Dur-Red simply filled and delivered an order for 12 skylights, exercising no control over the circumstances of Romito's accidental fall through a skylight 3 years later. Romito's failure to tie himself to a safety line cannot be attributed to Dur-Red." (*Id*. at 66-67.)

Here, on the other hand, E-Z Haul admits that it was the conduct of its employees that caused the damage to the telephone line, which is the event that caused plaintiff to go onto the roof where he fell. (See defendant's undisputed facts no.'s 13 and 14.) E-Z Haul contends that it was unforeseeable that its employees' negligence in knocking over the telephone pole could have resulted in the plaintiff climbing onto the roof of the neighboring building without a safety line and falling through an unprotected skylight. Yet the court must examine the issue of foreseeability in more general terms.

"[A]s to foreseeability, we have explained that the court's task in determining duty 'is not to decide whether a particular plaintiff's injury was reasonably foreseeable in light of a particular defendant's conduct, but rather to evaluate more generally whether the category of negligent conduct at issue is sufficiently likely to result in the kind of harm experienced that liability may appropriately be imposed…' [Citations.]" (*Cabral v. Ralphs Grocery Co.* (2011) 51 Cal.4th 764, 772.)

"While the court deciding duty assesses the foreseeability of injury from 'the category of negligent conduct at issue,' if the defendant did owe the plaintiff a duty of ordinary care the jury 'may consider the likelihood or foreseeability of injury in determining whether, in fact, the particular defendant's conduct was negligent in the first place.' An approach that instead focused the duty inquiry on case-specific facts would tend to 'eliminate the role of the jury in negligence cases, transforming the question of whether a defendant breached the duty of care under the facts of a particular case into a legal issue to be decided by the court…' [Citation.]" (*Id*. at 773.)

Thus, "the legal decision that an exception to Civil Code section 1714 is warranted, so that the defendant owed no duty to the plaintiff, or owed only a limited duty, is to be made on a more general basis suitable to the formulation of a legal rule, in most cases preserving for the jury the fact-specific question of whether or not the defendant acted reasonably under the circumstances." (*Ibid*.)

Therefore, the court cannot in the present case make the determination of the existence or nonexistence of a legal duty based on the narrow facts that led to the plaintiff's injury, but rather on a more general basis. In other words, the question is whether the type of negligent conduct at issue justifies imposing a duty of care on the defendant, not whether it was foreseeable that defendant's specific negligent conduct here would create the particular series of events that led to plaintiff's injuries in this specific case.

Viewed in this light, the court declines to find that defendant had no duty of care toward plaintiff. The general duty at issue here is the duty to avoid hitting objects with one's vehicle, and the court should not find as a matter of law that it was unforeseeable that someone might suffer an injury of the type suffered by plaintiff from such negligent conduct. It is certainly foreseeable that someone

might be hurt when a phone pole is struck by a moving vehicle, either immediately after the impact or later when the phone company attempts to repair the lines. The fact that plaintiff was not injured by a falling telephone pole or the resulting loose power or phone lines, but rather somewhat later when he tried to repair the lines, does not mean that defendant had no duty to avoid hitting the phone pole, or that it was unforeseeable that plaintiff might be injured as a result of defendant's negligence. Therefore, the court does not intend to grant summary judgment based on the purported lack of duty owed by E-Z Haul to plaintiff.

Finally, E-Z Haul argues that its negligence, if any, was not a direct and proximate cause of plaintiff's injuries, because the events leading to the plaintiff's fall were too remote and far removed from the defendant's negligent act, and the intervening negligence of the property owner and the plaintiff himself were superseding causes that broke the chain of causation. (*Girard v. Monrovia School Dist*. (1953) 121 Cal.App.2d 737, 744.)

"The concept of proximate or legal cause has 'defied precise definition.' [Citations.] It is reasonably well settled, however, that the causation inquiry has two facets: whether the defendant's conduct was the 'cause in fact' of the injury; and, if so, whether as a matter of social policy the defendant should be held legally responsible for the injury. [Citations.]" (*Osborn v. Irwin Memorial Blood Bank* (1992) 5 Cal.App.4th 234, 252.)

"Whether a defendant's conduct actually caused an injury is a question of fact [citation] that is ordinarily for the jury [Citation.] The two widely recognized tests for establishing cause in fact are the 'but for' rule, which asks whether the injury would not have occurred but for the defendant's conduct, and the rule set forth in the Restatement Second of Torts section 431, subdivision (a), which asks whether the defendant's conduct was a 'substantial factor in bringing about the harm.' [Citation.] Our Supreme Court has recently observed that the 'substantial factor' test generally subsumes the 'but for' test. [Citation.]" (*Ibid*.)

"However the test is phrased, causation in fact is ultimately a matter of probability and common sense: '[A plaintiff] is not required to eliminate entirely all possibility that the defendant's conduct was not a cause. It is enough that he introduces evidence from which reasonable men may conclude that it is more probable that the event was caused by the defendant than that it was not. The fact of causation is incapable of mathematical proof, since no man can say with absolute certainty what would have occurred if the defendant had acted otherwise. If, as a matter of ordinary experience, a particular act or omission might be expected to produce a particular result, and if that result has in fact followed, the conclusion may be justified that the causal relation exists. In drawing that conclusion, the triers of fact are permitted to draw upon ordinary human experience as to the probabilities of the case.' [Citation.]" (*Id*. at 253.)

In *Mitchell v. Gonzales* (1991) 54 Cal.3d 1041, the California Supreme Court expressly disapproved BAJI 3.75, which sets forth the "but for" test for proximate cause, and approved BAJI 3.76, which incorporates the "substantial factor" test. (*Id*. at 1051-1052.)

"We believe the foregoing authorities properly criticize BAJI No. 3.75 for being conceptually and grammatically deficient. The deficiencies may mislead jurors, causing them, if they can glean the instruction's meaning despite the grammatical flaws, to focus improperly on the cause that is spatially or temporally closest to the harm." (*Id*. at 1052.)

"In contrast, the 'substantial factor' test, incorporated in BAJI No. 3.76 and developed by the Restatement Second of Torts, section 431 (com. to BAJI No. 3.76) has been comparatively free of criticism and has even received praise. 'As an instruction submitting the question of causation in fact to the jury in intelligible form, it appears impossible to improve on the Restatement's "substantial factor [test.]"' [Citation.] It is 'sufficiently intelligible to any layman to furnish an adequate guide to the jury, and it is neither possible nor desirable to reduce it to lower terms.' [Citation.]" (*Ibid*.)

Here, the court cannot find as a matter of law that E-Z Haul's conduct was not a substantial factor in causing plaintiff's injuries. E-Z Haul admits that it was the conduct of its employees that caused the phone lines to be torn down, which in turn caused plaintiff to come out and try to repair the lines. (Defendant's undisputed facts 13-15.) It was during the course of plaintiff's efforts to repair the lines that he fell through the skylight and was injured. (Undisputed facts 21-24.) Thus, defendant was arguably a substantial cause of plaintiff's injuries, and but for defendant's employees' negligence, plaintiff would not have been injured. Whether the plaintiff's accident was too remote from defendant's negligence to be considered a direct and proximate cause of plaintiff's injuries is an issue best left to the jury to resolve.

Likewise, the question of whether there was some intervening negligence that broke the chain of causation is a question of fact as well. While it is certainly possible that the negligence of other people, including Dennis' Auto Repair and plaintiff himself, contributed to the accident, this does not necessarily mean that E-Z Haul was not still a substantial cause of the accident. Generally speaking, as long as a defendant's negligence is a substantial factor in causing plaintiff's harm, the intervening negligence of another person that also contributed to the harm will not relieve the defendant of liability. (CACI 431; see also *Wilson v. Blue Cross of So. Cal.* (1990) 222 Cal.App.3d 660, 671, 672, citing the Restatement 2nd of Torts, § 431.)

"The defendant's negligent act need not be the *sole* cause of the injury; it is enough that it be *a cause*. When the separate and distinct negligent acts of two persons are in substantially simultaneous operation, and contribute to the

cause of the injury, 'each is and both are the proximate cause,' and the plaintiff may recover in full from either of the parties, or both. [Citations.]" (6 Witkin, Summary of Cal. Law, Torts (9th ed. 1988) § 970, p. 360, emphasis in original.)

"When the defendant's negligent conduct is the stimulus for some other act or force which then causes the harm, there is no break in the chain of causation. The intervening force which is the *normal* reaction to the defendant's negligent conduct is characterized by the Torts Restatement (§ 443) as a 'normal intervening force' and it is not a superseding cause. [Citation.]" (*Id*. at § 974, p. 365, emphasis in original.)

On the other hand, "[w]here, subsequent to defendant's negligent act, an independent intervening force actively operates to produce the injury, the chain of causation may be broken. It is usually said that if the risk of the injury might have been reasonably foreseen, the defendant is liable, but that if the independent intervening act is highly unusual or extraordinary, not reasonably likely to happen and hence not foreseeable, it is a *superseding* cause, and the defendant is not liable. [Citations.]" (*Id*. at § 975, p. 366, emphasis in original.)

Here, as discussed above, it was not necessarily unforeseeable that someone might be injured as a result of the defendant's negligence in striking and pulling down the phone pole. Nor can the court say as a matter of law that it was unforeseeable that someone trying to repair the phone line might be injured in the course of their work. While other parties' negligence may have also contributed to the chain of events that led to plaintiff's injuries, the intervening acts were not so unusual or extraordinary as to constitute a superseding cause that broke the chain of causation. Therefore, the court does not intend to grant summary adjudication in favor of E-Z Haul based on a lack of causation. Instead, the court intends to deny summary adjudication of the second cause of action for negligence as to E-Z Haul.

Dennis' Auto Repair's Motion: First, Dennis' Auto Repair argues that it cannot be held liable for plaintiff's injuries because plaintiff is akin to an independent contractor, and independent contractors and their employees cannot sue their hirers for injuries incurred in the workplace. (*Privette v. Superior Court* (1993) 5 Cal.4th 689, 695; *Tverberg v. Fillner Construction, Inc*. (2010) 49C al.4th 518, 528-529; *SeaBright Ins. Co. v. US Airways, Inc*. (2011) 52 Cal.4th 590, 594.) However, *Privette* and its progeny only apply where the independent contractor or its employees attempt to sue the person who hired them for injuries that were caused by the negligence of the contractor.

"Generally, when employees of independent contractors are injured in the workplace, they cannot sue the party that hired the contractor to do the work. [Citation.]" (*SeaBright, supra*, at 594.)

In *SeaBright*, the California Supreme Court held that, even if the hirer of the independent contractor failed to comply with workplace safety requirements imposed by Cal OSHA, the *Privette* rule still bars suit against the hirer. (*Ibid*.)

"By hiring an independent contractor, the hirer implicitly delegates to the contractor any tort law duty it owes to the contractor's employees to ensure the safety of the specific workplace that is the subject of the contract. That implicit delegation includes any tort law duty the hirer owes to the contractor's employees to comply with applicable statutory or regulatory safety requirements." (*Ibid*.)

Thus, "a hirer generally 'has no duty to act to protect the [contractor's] employee when the contractor fails in that task …' [Citation.]" (*SeaBright, supra*, 52 Cal.4th at 602.)

In the present case, however, Dennis' Auto Repair has not presented any evidence showing that it hired plaintiff as an independent contractor, or that it somehow delegated its duty to provide a safe workplace to plaintiff or his employer. In fact, defendants admit that they did not hire plaintiff or his employer, AT&T, to work on the broken phone line. (Defendants' Points and Authorities Brief, p. 5:15-16.) Nevertheless, defendants argue that the court should extend the *Privette* rule to include parties who did not hire an independent contractor to perform the work, because plaintiff has already been compensated for his injuries through workers' compensation and he should not be entitled to further compensation from defendants. However, the court declines to extend the rule of nonliability under *Privette*, since *Privette* and its progeny base their holdings on the relationship between a hirer and an independent contractor. Since there is no evidence of such a relationship here, the court cannot grant summary judgment based on the theory that *Privette* bars plaintiff's claims against defendants.

Defendants also argue that the fact that they did not actually hire plaintiff or his employer to do work for them does not mean that *Privette* does not apply, citing to *Ruiz v. Herman Weissaker, Inc*. (2005) 130 Cal.App.4th 52. However, in *Ruiz* the Court of Appeal merely held that an employee's negligence claim against an agent of the hirer of the independent contractor was barred under *Privette* and its progeny. (*Id*. at 62.) In effect, the defendant in *Ruiz* was an extension of the hirer, and thus it could take advantage of the Privette doctrine. (*Ibid*.) Here, on the other hand, defendants concede that they did not hire plaintiff or AT&T to do work on the premises. Therefore, the *Privette* doctrine would not apply to bar the plaintiff's claims.

Also, even assuming that defendants were in effect the hirers of plaintiff or his employer, they can still be held liable for failing to warn about dangerous conditions on their premises. (*Kinsman v. Unocal Corp.* (2005) 37 Cal.4th 659, 664.) In *Kinsman*, the California Supreme Court held that, despite the general

rule against hirer liability for injuries to employees of independent contractors under *Privette*, "a landowner that hires an independent contractor may be liable to the contractor's employee if the following conditions are present: the landowner knew, or should have known, of a latent or concealed preexisting hazardous condition on its property, the contractor did not know and could not have reasonably discovered this hazardous condition, and the landowner failed to warn the contractor about this condition." (*Ibid*.)

The court noted that, "when the hirer does not fully delegate the task of providing a safe working environment, but in some manner actively participates in how the job is done, and that participation affirmatively contributes to the employee's injury, the hirer may be liable in tort to the employee." (*Id*. at 671.) The court held that the general duty of the landowner to repair or warn of dangerous conditions on his or her property under *Rowland v. Christian* (1968) 69 Cal.2d 108 also applies where an employee of an independent contractor goes onto the property to perform work. (*Id*. at 673-674.)

"[W]hen there is a known safety hazard on a hirer's premises that can be addressed through reasonable safety precautions on the part of the independent contractor, a corollary of *Privette* and its progeny is that the hirer generally delegates the responsibility to take such precautions to the contractor, and is not liable to the contractor's employee if the contractor fails to do so. We see no persuasive reason why this principle should not apply when the safety hazard is caused by a preexisting condition on the property, rather than by the method by which the work is conducted. [¶] However, if the hazard is concealed from the contractor, but known to the landowner, the rule must be different. A landowner cannot effectively delegate to the contractor responsibility for the safety of its employees if it fails to disclose critical information needed to fulfill that responsibility, and therefore the landowner would be liable to the contractor's employee if the employee's injury is attributable to an undisclosed hazard. Nothing in the *Privette* line of cases suggests the contrary. As in *Hooker* and *McKown*, the hirer's liability in such circumstances would be derived from the hirer's rather than the contractor's negligence." (*Ibid*.)

Thus, "the hirer as landowner may be independently liable to the contractor's employee, even if it does not retain control over the work, if: (1) it knows or reasonably should know of a concealed, preexisting hazardous condition on its premises; (2) the contractor does not know and could not reasonably ascertain the condition; and (3) the landowner fails to warn the contractor." (*Id*. at 675.)

Here, it appears that plaintiff is alleging that he was injured by a concealed defective condition on the premises. There is also evidence that the skylight was similar to the material and color of the roof, which made the skylight more difficult to see. (Exhibit C to Gordon decl., Coplin depo., at pp. 67:8-14; 68:8-10; 84:1-6;

138:22-24.)[1] Plaintiff has also alleged that defendants were aware of the dangerous condition and failed to warn of it or repair it. (Complaint, ¶¶ 10, 12.) Defendants have not presented any evidence indicating that they were not aware of the dangerous condition posed by the skylight, or that they did anything to warn of the danger or to make the skylight safer. Therefore, even assuming that plaintiff was hired by defendants to perform work on the property, this does not necessarily mean that his claim is barred by *Privette* and its progeny, since defendants would still have a duty to warn about the concealed dangerous condition of which they had actual or constructive knowledge under *Kinsman*. As a result, the court cannot grant summary judgment in favor of Dennis' Auto under *Privette*.

Defendants also argue that plaintiff cannot prove causation because he is akin to a "sophisticated user" of a product, and thus he was effectively on notice about the dangers of walking on a roof to repair the phone line. However, the "sophisticated user" doctrine has only been applied in products liability cases, not in ordinary negligence or premises liability actions. (*Johnson v. American Standard, Inc.* (2008) 43 Cal.4th 56, 65.)

"The sophisticated user defense exempts manufacturers from their typical obligation to provide product users with warnings about the products' potential hazards. [Citation.] The defense is considered an exception to the manufacturer's general duty to warn consumers, and therefore, in most jurisdictions, if successfully argued, acts as an affirmative defense to negate the manufacturer's duty to warn. [Citation.] [¶] Under the sophisticated user defense, sophisticated users need not be warned about dangers of which they are already aware or should be aware. [Citation.] Because these sophisticated users are charged with knowing the particular product's dangers, the failure to warn about those dangers is not the legal cause of any harm that product may cause. [Citation.] The rationale supporting the defense is that 'the failure to provide warnings about risks already known to a sophisticated purchaser usually is not a proximate cause of harm resulting from those risks suffered by the buyer's employees or downstream purchasers.' [Citation.] This is because the user's knowledge of the dangers is the equivalent of prior notice. [Citation.]" (*Ibid*.)

In *Johnson*, the Supreme Court explained the rationale underlying the sophisticated user doctrine. "A manufacturer is not liable to a sophisticated user of its product for failure to warn of a risk, harm, or danger, if the sophisticated user knew or should have known of that risk, harm, or danger. It would be nearly impossible for a manufacturer to predict or determine whether a given user or

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[1] Defendant has objected to several portions of plaintiff's evidence, as well as improperly objecting to several of the material facts in support of the opposition. A party can only object to evidence, not to material facts in support of the motion or opposition. (CCP § 437c(c).) The objections to the material facts are overruled. (See objections 8-25.) Objections 1-5 are sustained, but do not affect the outcome of the motion.

member of the sophisticated group actually has knowledge of the dangers because of the infinite number of user idiosyncrasies. For example, given users may have misread their training manuals, failed to study the information in those manuals, or simply forgotten what they were taught. However, individuals who represent that they are trained or are members of a sophisticated group of users are saying to the world that they possess the level of knowledge and skill associated with that class. If they do not actually possess that knowledge and skill, that fact should not give rise to liability on the part of the manufacturer." (*Id*. at 71.)

Thus, the sophisticated user doctrine applies in products liability cases as a defense for the manufacturer, who cannot be expected to predict all possible misuses of its product by sophisticated users. However, this is not a product liability case, and plaintiff is not alleging that defendants negligently manufactured the skylight. Instead, plaintiff is suing on the theory that the skylight constituted a dangerous condition on the premises that defendants should have warned him about, or that defendants should have taken measures to reduce the danger. (Complaint, ¶¶ 10-12.) Defendants have not cited any authorities that have extended the sophisticated user doctrine to apply to premises liability or general negligence cases, and it does not appear to apply to these facts. Therefore, the court declines to use the sophisticated user doctrine to find that plaintiff cannot prove causation.

Finally, defendants argue that plaintiff's claims are barred by the doctrine of primary assumption of the risk.

"In cases involving 'primary assumption of risk'--where, by virtue of the nature of the activity and the parties' relationship to the activity, the defendant owes no legal duty to protect the plaintiff from the particular risk of harm that caused the injury--the doctrine continues to operate as a complete bar to the plaintiff's recovery." (*Knight v. Jewett* (1992) 3 Cal.4th 296, 314-315.)

"As a general rule, persons have a duty to use due care to avoid injury to others, and may be held liable if their careless conduct injures another person. [Citation.] Thus, for example, a property owner ordinarily is required to use due care to eliminate dangerous conditions on his or her property. [Citation.] In the sports setting, however, conditions or conduct that otherwise might be viewed as dangerous often are an integral part of the sport itself. Thus, although moguls on a ski run pose a risk of harm to skiers that might not exist were these configurations removed, the challenge and risks posed by the moguls are part of the sport of skiing, and a ski resort has no duty to eliminate them. [Citation.] In this respect, the nature of a sport is highly relevant in defining the duty of care owed by the particular defendant." (*Id*. at 315.)

"Although defendants generally have no legal duty to eliminate (or protect a plaintiff against) risks inherent in the sport itself, it is well established that

defendants generally do have a duty to use due care not to increase the risks to a participant over and above those inherent in the sport. Thus, although a ski resort has no duty to remove moguls from a ski run, it clearly does have a duty to use due care to maintain its towropes in a safe, working condition so as not to expose skiers to an increased risk of harm. The cases establish that the latter type of risk, posed by a ski resort's negligence, clearly is not a risk (inherent in the sport) that is assumed by a participant. [Citation.]" (*Id*. at 315-316.)

"Rather than being dependent on the knowledge or consent of the particular plaintiff, resolution of the question of the defendant's liability in such cases turns on whether the defendant had a legal duty to avoid such conduct or to protect the plaintiff against a particular risk of harm. As already noted, the nature of a defendant's duty in the sports context depends heavily on the nature of the sport itself. Additionally, the scope of the legal duty owed by a defendant frequently will also depend on the defendant's role in, or relationship to, the sport." (*Id*. at 316-317.)

"The overwhelming majority of the cases, both within and outside California, that have addressed the issue of coparticipant liability in such a sport, have concluded that it is improper to hold a sports participant liable to a coparticipant for ordinary careless conduct committed during the sport--for example, for an injury resulting from a carelessly thrown ball or bat during a baseball game--and that liability properly may be imposed on a participant only when he or she intentionally injures another player or engages in reckless conduct that is totally outside the range of the ordinary activity involved in the sport. [Citation.]" (*Id*. at 318.)

"Determining whether the primary assumption of risk doctrine applies is a legal question to be decided by the court." (*Beninati v. Black Rock City, LLC* (2009) 175 Cal.App.4th 650, 656.)

"[T]he question of the existence and scope of a defendant's duty of care is a legal question which depends on the nature of the sport or activity in question and on the parties' general relationship to the activity, and is an issue to be decided by the court, rather than the jury. [Citation.] Thus, the question of assumption of risk is much more amenable to resolution by summary judgment under a duty analysis than under the dissenting opinion's suggested implied consent approach." (*Knight, supra,* 3 Cal.4th at 313.)

Also, the Supreme Court in *Knight* observed in a footnote that primary assumption of the risk also applies in cases involving the "firefighter's rule." (*Id*. at 309, fn. 5.) "In addition to the sports setting, the primary assumption of risk doctrine also comes into play in the category of cases often described as involving the 'firefighter's rule.' [Citation.] In its most classic form, the firefighter's rule involves the question whether a person who negligently has started a fire is liable for an injury sustained by a firefighter who is summoned to fight the fire; the

rule provides that the person who started the fire is not liable under such circumstances. [Citation.] Although a number of theories have been cited to support this conclusion, the most persuasive explanation is that the party who negligently started the fire had no legal duty to protect the firefighter from the very danger that the firefighter is employed to confront. [Citations.] Because the defendant in such a case owes no duty to protect the firefighter from such risks, the firefighter has no cause of action even if the risk created by the fire was so great that a trier of fact could find it was unreasonable for the firefighter to choose to encounter the risk." (*Ibid*.)

The "firefighter's rule" has also been extended to other professions that carry inherent risk of certain types of harm. For example, there is a "veterinarian's rule" that bars a vet from suing the owner of an animal that bites the vet when the vet attempts to provide treatment. (*Cohen v. McIntyre* (1993) 16 Cal.App.4th 650, 655-656; *Nelson v. Hall* (1985) 165 Cal.App.3d 709.)

Likewise, the firefighter's rule has been applied to a nurse's aide in a convalescent hospital whose job was to care for senile and sometimes violent patients. (*Herrle v. Estate of Marshall* (1996) 45 Cal.App.4th 1761, 1765-1766.) Since the very nature of the plaintiff's job was dealing with mentally incompetent persons and preventing patients from harming themselves and others, the plaintiff could not sue the patient's estate for injuries she suffered when the patient attacked her. (*Ibid*.)

The Courts of Appeal have also applied the firefighter's rule to a professional shark handler bitten while attempting to move a shark, and a probation corrections officer injured during a training exercise. (*Rosenbloom v. Hamour Corp*. (1998) 66 Cal.App.4th 1477; *Hamilton v. Martinelli & Associates Justice Consultants, Inc*. (2003) 110 Cal.App.4th 1012.)

However, defendants have not cited any cases where the firefighter's rule has been applied to a telephone lineman, or indeed any profession which requires employees to work on roofs or other high places from which the employees could fall. While defendants contend that the risk of falling is inherent in the job of being a lineman, by defendant's logic any job that requires its employees to work above the ground would be subject to primary assumption of the risk. Thus, tree trimmers, satellite and cable TV repairmen or installers, construction workers, window washers, etc. would all be barred from bringing claims under the firefighter's rule. Yet defendant has not cited to any cases where the claim of these types of workers have been found to be barred by primary assumption of the risk. Indeed, most of the primary assumption of the risk cases deal with inherently risky sporting activities, or certain types of professions that carry obvious and inherent dangers like fighting fires, apprehending criminals, and handling potentially dangerous animals.

Courts have also refused to extend the firefighter's rule to several occupations, despite the fact that those occupations carry inherent risks. In *Nieghbarger v. Irwin Industries, Inc*. (1994) 8 Cal.4th 532, the California Supreme Court refused to apply the firefighter's rule to industrial safety officers who occasionally provided firefighting services at defendant's oil refinery after they were burned in a fire.

"The most substantial justifications for the firefighter's rule are those based on the public nature of the service provided by firefighters and the relationship between the public and the public firefighter. Firefighting is essentially a government function, and the public has undertaken the financial burden of providing it without liability to individuals who need it. Because of the relationship between the public, the firefighter, and those who require the services of the firefighter, the individual's usual duty of care towards the firefighter is replaced by the individual's contribution to tax-supported compensation for the firefighter. This relationship is missing between a privately employed safety employee and a third party." (*Id*. at 546.)

The *Neighbarger* court also noted that courts have refused to apply the firefighter's rule to private ambulance services, since the rule is based primarily on the fact that firefighters and police officers are public employees who are compensated by the public and owe a duty to the public as a whole. (*Ibid*, citing *Kowalski v. Gratopp* (1989) 177 Mich. App. 448.) Thus, the courts have been reluctant to extend the firefighter's rule beyond certain public service jobs that require the worker to expose him or herself to inherent dangers.

In addition, the firefighter's rule has never been applied where the defendant's negligence did not cause the fire. (*Terhell v. Am. Commonwealth Assoc's.* (1985) 172 Cal.App.3d 434, 443.) Thus, in *Terhell*, the defendant property owner's negligence in having an unguarded hole in its roof was not covered by the firefighter's rule, even though plaintiff was a firefighter and was injured in the course his job duties while he was on defendant's property. (*Ibid*.)

" '…[The] [firefighter's] rule only bars a firefighter from recovering for injuries resulting from a person's negligence or recklessness in causing the fire or other emergency which is the reason for the [firefighter's] presence.' [Citation.] It does ' "…not deal with… situations in which there is some hidden danger known to the defendant but not to the [firefighter], nor situations in which the [firefighter] is injured as a result of some risk beyond those inevitably involved in firefighting. Neither [does it] deal with those situations in which the defendant's negligence occurred after the [firefighter] arrived on the scene and materially enhanced the risk of harm or created a new risk of harm…"' [Citation.]" (*Id*. at 440, quoting *Lipson v. Superior Court* (1982) 31 Cal.3d 362, 366-367.)

"The *Lipson* court further defined the limits of the rule: 'It is… unmistakably clear that in California, the [firefighter's] rule has never been construed as

shielding a defendant from liability for acts of misconduct which are independent from those which necessitated the summoning of the [firefighter]. [Citations.] The rule has only been applied to prohibit a [firefighter] from recovering for injuries caused by the very misconduct which created the risk which necessitated his [or her] presence.' In its footnote 4 at this point, the court stated, in part: 'A review of the California court decisions which have applied the [firefighter's] rule finds no exceptions to this statement…' [Citation.]" (*Id*. at 440.)

Here, the negligence of Dennis' Auto Repair was not the reason for plaintiff's presence at the scene, and he was allegedly injured by a concealed dangerous condition on the property that had nothing to do with the reason for his being summoned to the property. Thus, even assuming that the firefighter's rule might apply to plaintiff's profession as a telephone lineman, it would not apply to the particular accident alleged in the complaint, because it was not a normal risk inherent in plaintiff's work and defendants' negligence was not the cause of plaintiff's presence at the scene. Therefore, the court does not intend to grant summary judgment based on the primary assumption of the risk doctrine.

Pursuant to CRC 3.1312 and CCP §1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: JYH on 4/10/2012 .
(Judge's Initials) (Date)

(19) **Tentative Ruling**

Re: ***Tri Counties Bank v. Vasquez***
Case No. 06CECG02369

Hearing Date: April 11, 2012 (Dept. 402)

Motion: by the parties for preliminary approval of class settlement

Tentative Ruling:

To grant, and sign the proposed order submitted by counsel.

Explanation:

The standards for a post-certification settlement have been thoroughly discussed in recent case law. See Munoz v. BCI Coca-Cola Bottling Co. (2010) 186 Cal. App. 4th 399 (rev. denied), which stated the standard for reviewing class action settlements:

> "The trial court's discretion is broad, and is to be exercised through the application of several well-recognized factors. The list, which is not exhaustive and should be tailored to each case, includes the strength of plaintiffs' case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed and the stage of the proceedings, the experience and views of counsel, the presence of a governmental participant, and the reaction of the class members to the proposed settlement."
>
> (*Id*. at 407.)

> "While the court must stop short of the detailed and thorough investigation that it would undertake if it were actually trying the case, it must eschew any rubber stamp approval in favor of an independent evaluation."
>
> (*Id*. at 407-408.)

See also *Cho v. Seagate Technology Holdings, Inc.* (2009) 177 Cal. App. 4th 734, 742-743, where the Court affirmed the fairness of a class action settlement, while also requiring new class notice and an unambiguous definition of class. See also *Kullar v. Foot Locker Retail*, *Inc.* (2008) 168 Cal. App. 4th 116, 129: "The court has a fiduciary responsibility as guardians of the rights of the absentee class members when deciding whether to approve a settlement agreement."

"[T]o protect the interests of absent class members, the court must independently and objectively analyze the evidence and circumstances before it in order to determine whether the settlement Is in the best interests of those whose claims will be extinguished . . . [therefore] the factual record must be before the . . . court must be sufficiently developed." (*Id*. at 130.)

This is the parties' third request for preliminary approval. All prior concerns raised by the Court at the May 4, 2011 and the November 2, 2011 hearings have been addressed and resolved. The amount of attorney's fees sought is sufficiently supported by the Court's case file for preliminary approval purpose; the Court does expect detailed billings with the motion for an award of attorney's fees to be heard at the final approval hearing.

As for the incentive payments to the named class members, they are reasonable in light of the work done and the excellent results. See *Cook v. Niedert* (7th Cir. 1998) 142 F.3d 1004, contrasting incentives from $1,000 to $10,000 with those which were higher. "Numerous courts have not hesitated to grant incentive awards to representative plaintiffs who have been able to effect substantial relief for classes they represent." *In re Dunn & Bradstreet Credit Services Customer Litigation* (S.D. Ohio 1990) 130 F.R.D. 366, 373. That has occurred here.

Pursuant to Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: JYH on 4/10/2012.
(Judge's initials) (Date)

[25] **Tentative Ruling**

Re: ***In The Matter of Haylee Rios***
Superior Court Case No. 12 CECG 00384

Hearing Date: April 11, 2012 (Dept. 403)

Motion: Petition for Minor's Compromise

Tentative Ruling:

To grant. Hearing off calendar.

Pursuant to California Rules of Court, rule 391, subd. (a) and Code of Civil Procedure section 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling Issued By: MWS (Judge's initials) **on 4/10/12** (Date)**.**

Tentative Ruling

(17)

Re: ***Penrose v. Gregory et al.; and related cross-complaint***
Superior Court Case No. 11 CECG 01041

Hearing Date: April 11, 2012 (Dept. 501)

Motion: Demurrer to Second Amended Cross-Complaint

Tentative Ruling:

To sustain the demurrer to the first and second causes of action with leave to amend; to overrule the demurrer to third cause of action. A Third Amended Cross-Complaint shall be filed and served within 10 days of the clerk's service of this minute order. New allegations shall be in boldface type font.

Explanation:

A demurrer is made under Code of Civil Procedure section 430.10, and is used to test the legal sufficiency of the complaint or other pleading. (Weil & Brown, *Civil Procedure Before Trial* (Rutter Group 2010) "Attacking the Pleadings" § 7:5.) The demurrer admits the truth all material facts properly pleaded, but not mere contentions, deductions or conclusions of fact or law. In addition to the face of the pleading, the court may also consider matters judicially noticed. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

First Cause of Action – Breach of Contract

The elements of a breach of contract action are: (1) the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to plaintiff." (*Careau & Co. v. Security Pacific Business Credit, Inc*. (1990) 222 Cal.App.3d 1371, 1388.)

Failure to State Sufficient Facts to Constitute a Cause of Action:

"The time bar of a statute of limitations may be raised by demurrer '[w]here the complaint discloses on its face that the statute of limitations has run on the causes of action stated in the complaint, [for the reason that] it fails to state facts sufficient to constitute a cause of action. [Citation.]' [Citation.]" (*County of Los Angeles v. Commission on State Mandates* (2007) 150 Cal.App.4th 898, 912.) The statute of limitations on a written contract is four years. (Code Civ. Proc., § 337)

"As a general rule, a cause of action accrues and a statute of limitations begins to run when a controversy is ripe—that is, when all of the elements of a

cause of action have occurred and a suit may be maintained." (*Armstrong Petroleum Corp. v. Tri-Valley Oil & Gas Co*. (2004) 116 Cal.App.4th 1375, 1388.) In general, a breach of contract claim accrues at the time of the breach. (*Romano v. Rockwell Internat., Inc*. (1996) 14 Cal.4th 479, 488.) Damage to the plaintiff is an element of the cause of action; plaintiff's knowledge of the damage is not. (*Neel v. Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6 Cal.3d 176, 186.)

However, in contract cases involving a fiduciary relationship or other extraordinary circumstances, courts have applied the "discovery rule," which tolls the statute of limitations until the plaintiff discovers, or could have discovered through reasonable diligence, both the breach and the resulting injury or damage. (*Angeles Chemical Co. v. Spencer & Jones* (1996) 44 Cal.App.4th 112, 119.) Application of the discovery rule is particularly appropriate where a breach of contract occurs "in secret" and the harm flowing from it "will not be reasonably discoverable by plaintiffs until a future time." (*April Enterprises Inc. v. KTTV* (1983) 147 Cal.App.3d 805, 832 (*April Enterprises*).) For example, the courts have applied the discovery rule where the act causing injury would have been difficult to detect because it was both the injury and the act that caused the plaintiff not to discover the injury. (*Gryczman v. 4550 Pico Partners, Inc*. (2003) 107 Cal.App.4th 1, 6 [failure to extend right of first refusal].)

In *April Enterprises*, *supra*, 147 Cal.App.3d 805, the hidden injury was the erasure of video tapes held by the defendant and the appellate court had this to say about pleading compliance with the discovery rule:

> The discovery rule itself contains procedural safeguards protecting against lengthy litigation on the issue of accrual. It presumes that a plaintiff has knowledge of injury on the date of injury. In order to rebut the presumption, a plaintiff must plead facts sufficient to convince the trial judge that delayed discovery was justified.

(*Id*. at p 832.)
“It is plaintiff's burden to establish 'facts showing that he was not negligent in failing to make the discovery sooner and that he had no actual or presumptive knowledge of facts sufficient to put him on inquiry.” (*Id*. at p. 833.) [Citations omitted.].

Where a plaintiff seeks to rely on the discovery rule because the complaint shows on its face that the plaintiff's claim is barred by the applicable statute of limitations, the plaintiff "'must specifically plead facts which show (1) the time and manner of discovery and (2) the inability to have made earlier discovery despite reasonable diligence. [Citations.] Mere conclusory assertions that delay in discovery was reasonable are insufficient and will not enable the complaint to withstand general demurrer. [Citation.]' [Citations.]" (*CAMSI IV v. Hunter Technology Corp*. (1991) 230 Cal.App.3d 1525, 1536-1537.) Although the cross-complainants were instructed to, they still have not plead with exactitude that the

failure to obtain the Certificate of Compliance was “committed in secret” and could not reasonably be discovered until the instant lawsuit or the Notice of Violation by the County. Rather they have only pled that they relied on Provost as a professional agent in securing the Certificate of Compliance and therefore had no incentive to verify that the necessary permits and Certificate of Compliance had been obtained. Also they have merely pled, in conclusory terms that the failure to obtain the Certificate of Compliance was committed in secret and or outside cross-complainant’s knowledge and could not reasonably been discovered until April 2011. This is not enough. *CAMSI IV v. Hunter Technology Corp*., *supra*, requires specific facts, not mere conclusions.

What was said or written by Provost leading cross-complainants to believe that they need not inquire as to the status of the Certificate of Compliance; especially where the initial transfer deed to the Avilas could be read as indicating no completed certificate of compliance was issued? When was this done? Who made these representations to whom? Why did cross-complainants never go to the County to ascertain the status of the Certificate of Compliance themselves?

Provost requests judicial notice of the deeds underlying the relevant transactions and the court is inclined to grant it. Under Evidence Code section 452, "Judicial notice may be taken of the following matters[:] (d) Records of (1) any court of this state . . . [and;] (h) Facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy." (Evid. Code, § 452, subds. (d) & (h); *Fontenot v. Wells Fargo Bank, N.A*. (2011) 198 Cal.App.4th 256, 264-265.) Judicial notice of the deeds does not change the outcome, however. As a general rule, courts do not take judicial notice of the truthfulness and interpretation of a document's contents because they are disputable. (*StorMedia Inc. v. Superior Court* (1999) 20 Cal.4th 449, 456-457, fn. 9.)

While cross-complainants do not dispute the authenticity or accuracy of the deeds, they do dispute the interpretation of the Exhibit “A”’s notation “In accordance with certificate of compliance application review request No. 3164.” Provost claims that a lay person would have under stood this to mean that the Certificate was not yet obtained. Cross-Complainants argue that lay persons would understand that it might mean that the approval of the Certificate would back-validate the Deed. The court cannot judicially notice the interpretation of the language.

“[A]s to accrual, 'once properly pleaded, belated discovery is a question of fact.' (Bastian v. County of San Luis Obispo [(1988)] 199 Cal.App.3d [520,] 527.) As our state's high court has observed: 'There are no hard and fast rules for determining what facts or circumstances will compel inquiry by the injured party and render him chargeable with knowledge. [Citation.] It is a question for the trier of fact.' [Citation.]" (*E-Fab, Inc. v. Accountants, Inc. Services* (2007) 153

Cal.App.4th 1308, 1320.) However, for purposes of sustaining a demurrer on limitations grounds, the issue of delayed discovery cannot be decided as a matter of law unless reasonable minds can draw only a single conclusion from the evidence. (*Ibid*.)

Second Cause of Action – Negligence

To prevail in an action for negligence, a plaintiff must plead and prove the following essential elements: (1) defendant's legal duty of care; (2) defendant's breach of duty (i.e., the negligent act or omission); (3) the breach was a proximate or legal cause of her injury (i.e., causation); and (4) damages. (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 673.)

Provost attacks the second cause of action for negligence on the ground it is barred by the statute of limitations. A cause of action for professional negligence is generally governed by the two-year statute of limitations under Code of Civil Procedure section 339, subdivision 1 for an “action upon a contract, obligation or liability not founded upon an instrument of writing.” (*Thomson v. Canyon* (2011) 198 Cal.App.4th 594, 606.) This rule has been applied to engineers. (*Roger E. Smith v. SHN Consulting Eng'rs & Geologists* (2001) 89 Cal.App.4th 638, 647.)

A cause of action for professional negligence does not accrue until the plaintiff (1) sustains damage and (2) discovers, or should discover, the negligence. (*Budd v. Nixen* (1971) 6 Cal.3d 195, 203.) While "the mere breach of a professional duty, causing only nominal damages, speculative harm, or the threat of future harm--not yet realized--does not suffice to create a cause of action for negligence," an action accrues, and the statute begins to run, as soon as the plaintiff suffers "appreciable harm" from the breach. (Id. at p. 200.)

Again, the cross-complainants should be granted leave to amend to more clearly allege delayed discovery consistent with the court’s ruling as stated with respect to the first cause of action.

Third Cause of Action – Implied Contractual Indemnity

As the Supreme Court has explained: "Historically, the obligation of indemnity took three forms: (1) indemnity expressly provided for by contract (express indemnity); (2) indemnity implied from a contract not specifically mentioning indemnity (implied contractual indemnity); and (3) indemnity arising from the equities of particular circumstances (traditional equitable indemnity). [Citations.] [¶] Although the foregoing categories of indemnity were once regarded as distinct, we now recognize there are only two basic types of indemnity: express indemnity and equitable indemnity. [Citation.] Though not extinguished, implied contractual indemnity is now viewed simply as 'a form of

equitable indemnity.' [Citations.]" (Prince v. Pacific Gas & Electric Co. (2009) 45 Cal.4th 1151, 1157, fn. omitted.)

Provost claims, citing no authority, that this cause of action must fail because the cause of action for breach of contract is time barred and appears to be under the misapprehension that this cause of action is for contractual indemnity.

The general demurrer to the third cause of action is overruled.

Pursuant to California Rules of Court, rule 3.1312, subd. (a) and Code of Civil Procedure section 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: M.B. Smith on 4/10/12 .
(Judge's initials) (Date)

(6)

Tentative Ruling

Re: ***Primex Farms, LLC v. Roll International Corporation***
Superior Court Case No.: 10CECG01114

Hearing Date: April 11, 2012 (**Dept. 502**)

Motion: (1) By Defendants Roll Global (successor-in-interest to Roll International Corporation), Westside Mutual Water Company, LLC, and Paramount Farming Company, LLC, to amend answer

(2) By Defendants Roll Global (successor-in-interest to Roll International Corporation), Westside Mutual Water Company, LLC, and Paramount Farming Company, LLC, for judgment on the pleadings;

(3) By Defendants Roll Global (successor-in-interest to Roll International Corporation), Westside Mutual Water Company, LLC, and Paramount Farming Company, LLC, to "trifurcate";

Tentative Ruling:

To grant the motion for leave to file a first amended answer, but with Defendants to include within the proposed affirmative defenses facts supporting the specific subdivisions of Public Utilities Code sections 2704, 2705, upon which they rely, and facts supporting the proposed affirmative defense number 34; to deny the motion for judgment on the pleadings; and to "trifurcate" the trial with the statute of limitations issues to be tried first, the element of Plaintiff's case-in-chief that the "conduct was wrongful by some legal measure other than the fact of interference itself" to be tried second, and finally the interference claims themselves to be tried last.

Explanation:

Amend answer

The court will, in the interests of justice, permit Defendants to amend the answer to allege the three proposed new affirmative defenses, on condition that Defendants allege what particular subdivision(s) of Public Utilities Code sections 2704 and 2705 they allege they did not violate/or complied with, and a statement of ultimate facts supporting the new affirmative defenses.

Judgment on the pleadings

An objection that the pleading doesn't state facts sufficient to constitute a cause of action is never waived (Code Civ. Proc., §430.80, subd. (a)), so the court will entertain the motion for judgment on the pleadings.

None of the cases cited by Defendants provide that a plaintiff must allege that a water company must affirmatively declare itself to be a public utility. In fact, statute provides that water companies are *by default* public utilities except as provided in Chapter 2 following section 2701 of the Public Utilities Code. (Pub. Util. Code, § 2704.)

Statute provides generally, that a mutual water company is a private corporation or association organized for the purpose of delivering water to its stockholders and members at cost. (Pub. Util. Code, § 2725.) The statutory scheme provides instances where a water supply not otherwise dedicated to public use can sell water to others who are not stockholders or members in various situations. (Pub. Util. Code, §§2704, 2705, 2706.)

In fact, a company organized as a mutual water corporation may acquire regulatory status as a public utility if it has dedicated to a public use by holding itself out as willing to supply water to the public or any portion thereof. (*Richfield Oil Corp. v. Public Utilities Commission* (1960) 54 Cal.2d 419, 426.) Indeed, if all a company had to do was decline to affirmatively dedicate its water to a public use in order to avoid becoming regulated as a public utility, the default status as a public utility under Public Utilities Code section 2701 subject to the "safe harbor" exceptions in sections 2704 and 2705, and the "safe harbor" exceptions themselves, would have no meaning.

Dedication of water to public service may be inferred from the acts of the owners and his dealings in relation to the property. (*California Water and Telephone Company v. Public Utilities Commission* (1959) 51 Cal.2d 478, 494.) Whether or not Defendant Westside Mutual Water Company's sales of water in 2007 and 2008 to those who were not stockholders or members at cost is something that will require the introduction of evidence at trial and in fact, Plaintiff has specifically alleged at ¶11 of the third amended complaint the conduct Defendants allegedly engaged in that constitutes the public dedication of its water rendering it a public utility instead of a mutual water company that constitutes the "independently wrongful" conduct upon which the interference claims are based.

The cases dealing with how a water company affirmatively turns itself into a public utility, while generally correct, do not apply when it is alleged that the Westside Mutual Water Company is not complying with the safe harbor provisions of Public Utilities Code sections 270 and 2705. While it is true that

water companies can sell water for profit, that would render the water company no longer a "mutual water company" and make it subject to the jurisdiction and rate-setting jurisdiction of the Public Utilities Commission. (Pub. Util. Code §2701, 2725, 2704, 2705.) Nothing in *Graham v. Atascadero Mutual Water Co.* (2001) 2001 Cal. PUC LEXIS 321, stands for the proposition that a mutual water company can charge non-members more for water than it can charge members because it is undisputed that in *Graham*, the evidence showed that the Atascadero Water Company delivered water only to its own members.

The conspiracy and aiding and abetting claims are supported by the allegations in ¶11 of the third amended complaint.

Motion to "trifurcate"

It is proper to try the issue of statute of limitations first because it could dispose of the entire case. (*Aerojet General Corporation v. Superior Court* (1986) 177 Cal.App.3d 950, 952-953.)

It would conserve judicial resources to try the issue of the "independent wrongful act" on the interference claims before the elements of the interference claims themselves because it is for the court to specifically state for the jury the conduct the judge has determined as a matter of law would satisfy the "wrongful conduct standard." (*PMC, Inc. v. Saban Entertainment, Inc.* (1996) 45 Cal.App.4th 579, 603; *Della Penna v. Toyota Motor Sales, U.S.A., Inc.* (1995) 11 Cal.4th 376, 393; see also *Lange v. TIG Ins. Co.* (1998) 68 Cal.App.4th 1179, 1187.)

The court anticipates that a different jury would be impanelled to try the first and third phases of the trial because the second phase will be tried to the court and will take substantial time to resolve.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling Issued By: DSB on 4-10-12.

(Judge's initials) (Date)

Tentative Ruling

Re: ***Hagopyan, et al v. Farmer's Insurance Group, et al***
Superior Court Case No. 11CECG02923

Hearing Date: April 11, 2012 (**Dept. 403**)

Motion: Demurrer by Arpi Yepremian to each cause of action in the first amended complaint; motion to strike claims for attorney's fees and punitive damages

Tentative Ruling:

To sustain the demurrer with leave to amend only if plaintiffs can truthfully allege specific conduct by Ms. Yepremian that supports application of an exception to the general rule that an insurance agent acting in the name of an insurance company is generally not personally liable to the insured; to grant the motion to strike the request for attorney's fees and punitive damages.

Explanation:

The authorities cited by the demurring defendant support her claim that she cannot be liable for breach of the insurance contract or breach of the covenant of good faith and fair dealing that attaches to the contract (i.e. the 1st through 3rd causes of action), because she is not alleged to be a party thereto. See ***Gruenberg v. Aetna Ins. Co.*** (1973) 9 Cal.3d 566, 576; ***Minnesota Mut. Life Ins. Co. v. Ensley*** (9th Cir. 1999) 174 F.3d 977, 981.

In relation to the 4th cause of action for negligent misrepresentation and the 5th for intentional fraud, there are no allegations that Ms. Yepremian made *any* representations to the plaintiffs. That clearly fails to state a claim with the specificity required by cases such as ***Cadlo v. Owens-Illinois, Inc.*** (2004) 125 Cal.App.4th 513, 519; ***Small v. Fritz Companies, Inc.*** (2003) 30 Cal.4th 167, 184.

And as to the 6th cause of action for negligence, the *only* mention of Ms. Yepremian in the entire complaint is in ¶4 where the complaint alleges, on information and belief:

> that at all material times and during the acts alleged herein, Farmer's acted by and through its officers, employees and agents, each of whom was acting within the course and scope of such agency and employment, and with the consent, permission and authorization of Farmers. Plaintiffs are further informed and believe that actions herein alleged taken by Arpi Yepremian and Arevik Hagopian as Farmer's sales agents, officers, agents and employees were ratified and approved by Farmer's.

The opinions in ***Lippert v. Bailey*** (1966) 241 Cal.App.2d 376, 382, and ***Kurtz, Richards, Wilson & Co. Inc. v. Insurance Communicators Marketing Corp.*** (1993) 12 Cal.App.4th 1249, 1257-1258, provide that where an agent contracts in the name of a disclosed insurer while acting in the course and scope of the agency, the insurer is liable, not the agent, and where the agent is alleged to have acted negligently, the complaining party's remedy lies against the insurer.

See also Croskey, Heeseman, Popik and Imre, ***California Practice Guide: Insurance Litigation*** at 2:51.2, explaining that the rationale for this rule is that the agent's negligence in performing duties within the scope of his or her employment is attributed to the insurance company:

> Where an agent is duly constituted and names his principal and contracts in his name and does not exceed his authority, the principal is responsible and not the agent.

Gasnik v. State Farm Ins. Co. (ED CA 1992) 825 F.Supp. 245, 249 (applying Calif. law).

The court will therefore sustain the demurrer to all six causes of action, with leave to amend only if plaintiffs can identify specific conduct by Ms. Yepremian that, despite the above-cited authorities, constitutes a legal basis for holding her personally liable for plaintiffs' injuries.

The court will also grant the motion to strike the request for punitive damages to the extent such relief is sought against Ms. Yepremian. Since she is not identified as a party to the insurance contract, there is no legal basis for an award of attorney's fees, and since no wrongful conduct on her part (intentional or otherwise) has been identitied, there is also no legal basis for claiming punitive damages.

Should plaintiffs chose to amend the complaint to try to state a viable claim against Ms. Yepremian, they will have 20 days in which to file a second amended complaint.

Pursuant to California Rules of Court, Rule 3.1312, subd. (a) and Code of Civil Procedure section 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

The time in which the complaint can be amended will run from service by the clerk of the minute order. All new allegations in the first amended complaint, should plaintiffs choose to file one, are to be set in **boldface** type.

Tentative Ruling Issued By: MWS (Judge's initials) **on 4/10/12** (Date) **.**

(18)

Tentative Ruling

Re: ***In re the trustee sale of the real property located at 1762 East Utah Ave., Fresno, CA 93720***
Case no. 11CECG04135

Hearing Date: **April 11, 2012 (Dept. 402)**

Motion: Petition and claim for order directing payment of surplus funds

Tentative Ruling:

To grant.

Explanation:

The court takes judicial notice of the petition filed by CR Title Services, Inc. in this proceeding. That petition was for deposit of surplus proceeds from the subject trustee sale, and for discharge from further responsibility for disbursement of such proceeds. On February 2, 2012 the court issued an order granting that petition.

Attachment 11b of CR Title Service's petition states that as of the date of the trustee sale on June 6, 2011 no junior liens were recorded against the property. Mark C. Thompson and Noemi Thompson are the trustors under the subject deed of trust. If there are no junior liens, or there is a surplus remaining after junior liens have been satisfied, the remaining proceeds from the foreclosure sale are paid to the trustor or the owner of the property on the date of the foreclosure sale. (*Eastland Sav. & Loan Assn. v. Thornhill & Bruce, Inc.* (1968) 260 Cal.App.2d 259, 262; *Cockerell v. Title Ins. & Trust Co.* (1954) 42 Cal.2d 284, 293; and *Atkinson v. Foote* (1919) 44 Cal.App.149, 156.) A trustor can recover amounts after the trustee sale. (*Schumacher v. Gaines* (1971) 18 Cal.App.3d 994, 1001.) (*See, generally*, Miller & Starr, *Calif. Real Estate* (3rd ed.) section 10:213, "Disposition of sale proceeds".) The other potential claimant to the proceeds, Bank of America, has not filed any opposition to the present petition. Therefore, the present petition is granted.

Pursuant to California Rules of Court, rule 3.1312, and California Code of Civil Procedure section 1019.5(a) no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: JYH on 4/10/2012.
(Judge's initials) (Date)